

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In The Matter of)

Implementation of the)
Telecommunications Act of 1996)

Amendment of Rules Governing)
Procedures to Be Followed When)
Formal Complaints Are Filed Against)
Common Carriers)

CC Docket No. 96-238

**REPLY OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION
TO COMMENTS ON
PETITION FOR RECONSIDERATION AND CLARIFICATION**

The Telecommunications Resellers Association ("TRA"),¹ through undersigned counsel and pursuant to Section 1.429(g) of the Commission's Rules, 47 C.F.R. § 1.429(g), hereby replies to the comments of SBC Communications Inc. ("SBC") on the petition for reconsideration and clarification filed by BellSouth Corporation ("Petition") challenging certain

¹ A national trade association, TRA represents more than 650 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. TRA is the largest association of competitive carriers in the United States, numbering among its members not only the majority of domestic providers of interexchange and international services but the majority of competitive local exchange carriers as well.

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aspects of the *Second Report and Order*, FCC 98-154, released by the Commission in the captioned docket on July 9, 1998.²

As the *Second Report and Order* itself makes clear, SBC has consistently opposed the establishment of an Accelerated Docket, terming such a process "unworkable"³ and "unconstitutional",⁴ and urging that admission onto such an Accelerated Docket be mandatorily predicated upon "exhaust[ion of] alternatives to the complaint process like arbitration, contractual dispute resolution and state commission proceedings,"⁵ all devices aimed toward prolonging rather than minimizing the amount of time required for a complaining carrier to obtain much-needed relief. SBC takes this opportunity to continue its criticism of the Accelerated Docket, a process designed to "minimize the opportunity for carriers to continue to engage in anti-competitive practices."⁶ Notwithstanding the intentional structuring of the Accelerated Docket to encourage detailed discussion between the parties to a complaint of all relevant factual elements significantly in advance of any document production deadline, SBC once again seeks to interject purely gratuitous delay into the Accelerated Docket complaint resolution process.

As the Commission has noted, entrenched incumbent providers have little or no independent incentive to relinquish control over "one of the last monopoly bottleneck strongholds

² Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers (Second Report and Order), CC Docket No. 96-238, FCC 98-154 (released July 9, 1998) ("Second Report and Order").

³ Second Report and Order, FCC 98-154 at ¶ 9.

⁴ Id. at ¶ 38.

⁵ Id. at ¶ 22.

⁶ Id. at ¶ 10.

in telecommunications -- the local exchange and exchange access markets".⁷ Indeed, "[m]onopoly providers, not unexpectedly, fight to retain their marketplace advantage."⁸ A primary tool in this effort is the ability to prolong resolution of complaints brought by new entrants to compel the opening of the local telecommunications market in particular. As Commissioner Furchtgott-Roth has observed, "while prompt decision-making can facilitate competition, it is unfortunate that much more frequently regulatory delay acts to impede markets."⁹ The Commission has thus appropriately recognized the compelling need to rapidly resolve complaints involving "conduct that is unreasonable, anti-competitive or otherwise harmful to consumers"¹⁰ and through the Accelerated Docket has acted to minimize, and hopefully eliminate, unnecessary delay in the complaint resolution process. SBC's unmeritorious arguments in support of the Petition would have the opposite effect, dramatically reducing the effectiveness of the Accelerated Docket even before that process has had an opportunity to demonstrate the full measure of its usefulness. SBC's arguments, accordingly, should be rejected.

⁷ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499, ¶ 4 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, 12 FCC Rcd. 12460 (1997), *aff'd/vacated in part sub. nom. Iowa Util. Bd. v. FCC*, 120 F.3d 753 (1997), *writ of mandamus issued* 135 F.3d 535 (8th Cir. 1998), *cert. granted* 118 S.Ct. 879 (Jan. 26, 1998).

⁸ Statement of Commissioner Susan Ness Federal Communications Commission Before the Subcommittee on Communications Committee on Commerce, Science, and Transportation, United States Senate (June 10, 1998).

⁹ Separate Statement of Commissioner Harold Furchtgott-Roth Re: Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 96-238 (released July 9, 1998).

¹⁰ Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers (Report and Order), 12 FCC Rcd. 22497 (1997).

In its comments in support of the Petition, SBC asserts, in essence, that an Accelerated Docket defendant will be unduly burdened by the obligation to include with its answer documents which would likely be offered as exhibits for or against its position at a minitrial, and that, accordingly, the Commission's "automatic" document production rule must be struck down. SBC is incorrect that such a defendant, having engaged in pre-filing settlement discussions of the precise, narrowly-confined issues presented, with continuing access throughout to Commission staff willing to respond to questions that the parties may have concerning discovery, would be unable to apply the Commission's enunciated "likely to bear" production standard within the allotted timeframe.

SBC asserts that "it will be extremely difficult, if not impossible, for larger corporate entities to know whether they have fully complied with [the] discovery rule by the deadline for production."¹¹ SBC further asserts that it "anticipates that serious sanctions await corporate entities that inadvertently failed to disclose relevant documents and other tangible things."¹² Finally, SBC urges that, based on the above two assertions, the Commission should "give the parties sufficient time to produce the relevant documents".¹³ Neither of SBC's assertions is true, and its support for relaxation of an already reasonable production standard is unpersuasive.

¹¹ Comments of SBC, p. 2.

¹² Id.

¹³ Id. SBC does not quantify the "sufficient time" it seeks; it is clear, however, that any relaxation of the Commission's "automatic" document production requirement would inevitably add to delay in the resolution of disputes, a result in direct conflict with the goals underlying establishment of the Accelerated Docket."

Through the *Second Report and Order*, the Commission has set forth with specificity the four criteria for materials which must be produced by the complainant at the time the complaint is filed, and by the defendant at the time the answer is filed:

materials "(1) that would not support the disclosing party's contentions; (2) that are likely to have an influence on or affect the outcome of a claim or defense; (3) that reflect the relevant knowledge of persons who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the parties; or (4) that competent counsel would consider reasonably necessary to prepare, evaluate or try a claim or defense."¹⁴

The Commission has provided further elucidation, stating that, "[f]undamentally, if a party would expect to proffer a document at the minitrial as an exhibit in support of its case, the party should produce the document. Similarly, if the party would expect its opponent, if it had the document, to proffer it as an exhibit against the party, the document should also be produced."

This is a fairly straight-forward standard which should be easily understood by the individual designated by even a large corporate entity to respond to an Accelerated Docket complaint. As SBC is aware, by the due date for an Accelerated Docket answer, the defendant will have been more or less intimately acquainted with the relevant facts giving rise to the action for quite some time. As the Commission noted in the *Second Report and Order*,

parties to Accelerated Docket proceedings will have full notice of their opponents' contentions well before the 60-day period for conclusion of the proceeding begins to run. During the mandatory pre-filing settlement discussions,

¹⁴ Second Report and Order, FCC 98-154 at ¶ 54.

parties will fully explore, under the supervision of Commission staff, the facts surrounding, and legal bases for, each side's claims and defenses. Thus, both sides should be in the position to begin actively litigating the complaint -- including providing substantial document discovery -- shortly after it is filed.¹⁵

Finally, SBC's fear that "serious sanctions" will flow from a party's "inadvertent" failure to disclose relevant documents is unrealistic. As an initial matter, the *Second Report and Order* makes clear that a party is neither expected nor permitted to produce every piece of even arguably relevant material, but rather "the most central, but not all relevant, documents".¹⁶ "What we envision this [likely to bear] standard as likely to avoid," states the Commission, "is the production of every single document that is relevant, even if only tenuously so, to the issues in a complaint proceeding."¹⁷

The discovery sanctions SBC anticipates will not flow from inadvertent violations. Indeed, in light of the enunciated discovery standard, such "truly inadvertent violations" are expected by the Commission to "be exceedingly rare."¹⁸ Notably, the Commission has also indicated that the "swift and effective sanctions" which SBC erroneously concludes will follow inadvertent failure to disclose¹⁹ are in actuality "necessary to ensure against attempts to prolong Accelerated Docket proceedings through discovery delay or abuse."²⁰

¹⁵ *Id.* at ¶ 12 (footnote omitted).

¹⁶ *Id.* at ¶ 50.

¹⁷ *Id.* at ¶ 55. As the Commission has also noted, "attempts to hide damaging information in an unnecessarily voluminous production also amounts to discovery abuse". *Id.* at ¶ 65.

¹⁸ *Id.* at ¶ 66.

¹⁹ SBC Comments, p. 2.

²⁰ *Second Report and Order*, FCC 98-154 at ¶ 65.

SBC's position is further eroded by the Commission's acknowledgement that "there may be circumstances in which a party's failure to comply with discovery orders may be due to circumstances beyond its control."²¹ For this reason, the Commission has refrained from adopting a presumption that all discovery violations will be subject to sanction.²² Thus, SBC's fears of imposition of sanctions for inadvertent failure to make discovery are without foundation. The Commission has determined to "monitor closely the effect and utility of the Accelerated Docket procedures" making such modifications to the Accelerated Docket procedure as experience dictates, and further has committed to do so "within a year of the effective date of these rules."²³ Accordingly, rather than denouncing those rules as unworkable, SBC might be better served, should it have the occasion to utilize the Accelerated Docket as complainant or defendant, to strive in good faith to comply not only with the automatic document production obligation but with the requirements set forth in the *Second Report and Order* as a whole.

²¹ *Id.* at ¶ 66.

²² *Id.*

²³ *Id.* at ¶ 106.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to retain the "automatic" document production requirement embodied in the *Second Report and Order*.

Respectfully submitted,

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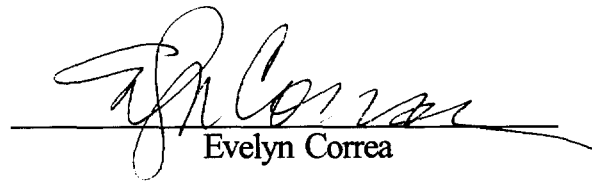
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I, Evelyn Correa, hereby certify that copies of the foregoing Comments were today sent by United States First Class Mail, postage prepaid, this 15th day of October, 1998, to the following:

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